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MICHAEL RODAK, JR., CL

In The

Supreme Court of the United States

October Term, 1974

Docket No. 73-1868

Civil Action No. 1823-72

KAN KAM LIN, YI CHUN CHENG and FONG CHING SIU,

Plaintiffs-Appellants,

vs.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America,

Defendants-Appellees.

Docket No. 73-1869

Civil Action No 1862-72

LAM YI KAM,

Plaintiff-Appellant,

vs.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America,

Defendants-Appellees.

(Continued)

Docket No. 73-1866

Civil Action No 167-73

YU FUNG CHENG and HI PAN CHAN,

Plaintiffs-Appellants,

vs.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America,

Defendants-Appellees.

Docket No. 73-1867

Civil Action No. 282-73

YEUNG YAN CHEUNG,

Plaintiff-Appellant,

vs.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America,

Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the District of New Jersey.

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Are aliens who are refugees, presently in the United States, eligible for the benefits of the United Nations Protocol relating to the status of refugees and entered into force with respect to the United States on November 1, 1968, notwithstanding the fact that they have violated their immigration status in the United States?

2. What is the meaning of the term "lawful" as it appears in Article 32 of the Protocol?

3. Did the Government abuse its discretion by raising an argument contrary to its consistent administrative policy when it considered the manner of entry and the status of the petitioners in the United States when the Government denied their applications for refugee status?

TREATY AND POLICY STATEMENT INVOLVED

PROTOCOL RELATING TO THE STATUS OF REFUGEES

ARTICLE 1 of the TREATY

Definition of the Term "Refugee"

A. (1) . . . and (2) . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

ARTICLE 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal and be represented for the purpose before competent authority or a person or persons specifically designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

POLICY STATEMENT

Department of State

January 4, 1972

General Policy for Dealing With Requests for Asylum by Foreign Nationals

Policy

Both within the United States and abroad, foreign nationals who request asylum of the United States Government owing to persecution or fear of persecution should be given full opportunity to have their requests considered on their merits. The request of a person for asylum or temporary refuge shall not be arbitrarily or summarily refused by United States personnel. Because of the wide variety of circumstances which may be involved, each request must be dealt with on an individual basis, taking into account humanitarian principles, applicable laws and other factors.

In such cases of such requests occurring within foreign jurisdiction, the ability of the United States Government to give assistance will vary with location and circumstances of the request.

United States Objectives

A basic objective of the United States is to promote institutional and individual freedom and humanitarian concern for the treatment of the individual.

Through the implementation of generous policies of asylum and assistance for political refugees, the United States provides leadership toward resolving refugee problems.

Background

A primary consideration in United States asylum policy is the Protocol Relating to the Status of Refugees, to which the Unites States is a party. The principles of asylum inherent in this international treaty (and in the 1951 Refugee Convention whose substantive provisions are by reference incorporated in the Protocol) and its explicit prohibition against the forcible return of refugees to conditions of persecution, have solidified these concepts further in international law. As a party to the Protocol, the United States has an international treaty obligation for its implementation within areas subject to jurisdiction of the United States.

United States participation in assistance programs for the relief of refugees outside the United States jurisdiction and for their permanent resettlement in asylum or other countries helps resolve existing refugee problems. It also avoids extensive accumulation of refugees in asylum countries and promotes the willingness of the latter to maintain policies of asylum for other arriving refugees.

President Nixon has reemphasized the United States commitment to the provision of asylum for refugees and directed appropriate Departments and Agencies of the United States Government, under the coordination of the Department of State, to take steps to bring to every echelon of the United States Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment.

STATEMENT

The petitioners are all natives and citizens of the Mainland of China. The Mainland of China is presently under the control of the People's Republic of China, a Communist government. The petitioners all allege and contend that they fled from China owing to a well-founded fear of being persecuted for reasons of their political opinions and they are unable and unwilling to return to their homeland owing to such fear.

The petitioner, Kan Kam Lin, arrived in the United States in November of 1968; Yi Chun Cheng arrived in the United States in November of 1969, and Fong Ching Siu arrived in the United States in May of 1971. After they entered the United States, the petitioners were accorded hearings in deportation and were found to be deportable as charged; however, they were granted the privilege of voluntary departure. When they did not depart during the existence of their voluntary departure time, they were

called upon to surrender for deportation. These three deportation hearings took place in 1971.*

At the time they were called upon to surrender for deportation, the aliens submitted applications for stays of deportation, coupled with applications for political asylum or temporary refuge in the United States, pursuant to the provisions of the Policy Statement of the Secretary of State of January 4, 1972 (formally published as Public Notice 351 in the Federal Register of February 16, 1972, 37 F. R. 3447). At that time, the aliens were granted temporary stays of deportation pending consultation by the Immigration Service with the State Department to determine the validity of their applications as refugees. At no time was their status in the United States questioned since everyone concerned knew that they were deportable aliens and, in fact, the Immigration Service and the State Department were routinely accepting these applications and acting upon them on the merits of the aliens' claims for refugee status without regard to the immigration status of the petitioners in the United States. The question of legal or illegal status in the United States was, apparently, a factor that was not germane to the requests.

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* Although four separate actions were commenced in the United States District Court for the District of New Jersey, the cases were handled as one, with one brief and one argument and decided in the same opinion. At the time of the argument of these cases in the District Court, the cases that were presented to the Court were the cases of *Kan Kam Lin*, *Yi Chun Cheng* and *Fong Ching Siu*. The matter was formally consolidated in the United States Court of Appeals for the Third Circuit. The facts with which the writer will concern himself in this petition for a Writ of Certiorari will be the fact patterns of the three cases mentioned, namely, *Kan Kam Lin*, *Yi Chun Cheng* and *Fong Ching Siu*, since the facts in these cases basically apply to all of the petitioners.

In their applications for asylum or temporary refuge, each of the petitioners herein stated they had fled from China because of the Communist control of that country and that they had never established permanent residence in any country other than the Mainland of China.

Thereafter, in the month of October 1972, they were advised by the Immigration Service that, after consideration and consultation with the Department of State it had been concluded that the Chinese aliens had failed to establish that they would be persecuted on account of race, religion or political opinions if returned to Hong Kong. No other reasons were set forth as to why their applications were denied.

The basis for the Policy Statement of January 4, 1972 is the International Treaty entered into by the United States on November 1, 1968, to wit, the Protocol Relating to the Status of Refugees. It is the contention of the petitioners that they are refugees as defined in Article 1(A)(2) of the Protocol, in that, owing to a well-founded fear of being persecuted, they are outside of the country of their nationality and are unable or unwilling to return to it and, therefore, being refugees, they are entitled to the benefits accorded them in the Protocol. Article 32 states that a refugee shall not be expelled except on grounds of national security or public order. In view of the fact that the petitioners fall directly under the definition of "refugee" as stated in the Treaty and, in view of the fact that the Government is attempting to deport them, an action was commenced in the District Court to declare the acts of the respondents illegal and in violation of the Treaty. The aliens were called upon to surrender for the

deportation in November of 1972. However, at that time, the Honorable Leonard I. Garth, United States District Judge, issued a temporary restraining order and set the matter down for a hearing on the aliens' applications for a preliminary injunction. On November 27, 1972, oral argument was held before Judge Leonard I. Garth, and a preliminary injunction, staying the deportation of the aliens, was granted. On December 15, 1972, a formal order to this effect was entered remanding the matter back to the Immigration Service for further consideration with the direction to take into consideration the definition of the word "refugee" as set forth in Article 1(A)(2) of the Treaty and, with reference to the meaning of Article 32(1) of the Treaty as it applies to the aliens herein.

Thereafter, on or about February 5, 1973, the aliens herein were again advised by the Immigration Service that their applications for political asylum or temporary refuge were denied since they failed to establish, pursuant to Article 32(1) of the Treaty, that they are lawfully in the United States and, that, pursuant to Article 1(A)(2) they would be persecuted on account of race, religion, nationality, membership of a particular social group or political opinion if returned to Hong Kong. Thereafter, Judge Leonard I. Garth signed another temporary restraining order and set the case down for argument on the aliens' applications for another preliminary injunction. This matter was then assigned to the Honorable Lawrence A. Whipple, U.S.D.J., who heard argument on the matter in March of 1973 and who then granted the Government's Motion for Summary Judgment, dismissing the complaints. This decision was affirmed by the United States Court of Appeals for the Third Circuit on March 14, 1974.

REASONS FOR GRANTING THE WRIT

The decision below raises a number of important questions with reference to the interpretation of an International Treaty relating to refugees which was entered into by the United States in 1968. The basis of the petitioners' action is the Treaty signed by the President of the United States upon the consent of the Senate and made effective November 1, 1968. This Treaty was mentioned by this Court in the case of *Immigration and Naturalization Service v. Stanisic*, 395 U.S. 62 (1969). However, the Court in that case did not specifically consider the question raised in the case at bar, but the Supreme Court did remand the *Stanisic* matter back for other purposes, with the following statement: "... Likewise, it is premature to consider whether, and under what circumstances, an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees, to which the United States acceded on November 1, 1968". It is the belief of the writer that the time and the situation now make it necessary for the Supreme Court to rule on the implications and meanings of the Protocol Relating to the Status of Refugees. In fact, the opinion of Judge Whipple in the United States District Court, the Honorable Judge specifically referred to the *Stanisic* case in his ruling and he interpreted the decision of the Supreme Court in a manner that would limit the effectiveness of the Treaty.

The decision of the Court below found that the aliens could not apply for the benefits of the Treaty because they were not aliens lawfully in the United States. This decision severely limits the operation of this Treaty in

view of the fact that many sections of the Treaty would, therefore, be unavailable to refugee aliens in the United States.

In the case at bar, the petitioners claim to be refugees. The facts are not in dispute. They left Red China because of the Communist government. They are unwilling to return to the country of their nationality because of the Communist government in that country. The definition of "refugee" as set forth in Article 1(A)(2) in the Treaty, is as follows:

> "... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or, owing to such fear, is unwilling to return to it".

The Immigration Service, in their notices sent to the aliens in February of 1973 indicated that the denials of the applications for "refugee" status were made without reference to the country of nationality of the petitioners, to wit, Red China. The denials dealt solely with Hong Kong which, obviously, showed that the respondents were not considering the definition of "refugee" as it appears in the Treaty. By the mere reading of the Treaty, it is obvious that the aliens herein fit the definition of "refugee" as defined in the Treaty. The Government has never stated

that the petitioners are not refugees from China. At one time during the litigation, it was the Government's position that the aliens are refugees from China and they stated that fact. This concession was later withdrawn. The District Court never reached the question as to whether or not the aliens are refugees pursuant to the Treaty, nor did the United States Court of Appeals.

It is interesting to note that this Court and the Senate noted that there were conflicts between the Treaty and the Immigration Laws. When the Senate approved the signing of the Protocol, they made two reservations; (one) dealing with the taxing of refugees who are not residents of the United States; and (two) the reservation with reference to any conflict it might have with the Social Security Act of the United States. No mention is made of any conflict with the Immigration and Nationality Act. The reservations recognize the difference between refugees in the United States and other aliens in the United States. Thus it can be seen that the Treaty granted rights to refugees outside of the ordinary operation of the Immigration Laws. The purpose of the Treaty and of the operating instructions is to help resolve existing refugee problems in the world. The interpretation urged by the aliens certainly fulfills the purpose of the Treaty and the Policy Statement, in that, it would help to relieve problems in the Far East. The petitioners herein are persons who are refugees in Hong Kong. They do not have the ordinary travel documents of a person who is a citizen of Hong Kong; in fact, the document that they do carry, to wit, a Hong Kong Seaman's Identity Book, is valueless except while being used by the aliens while at sea and is valid only for return to Hong Kong. It is further alleged and it is the belief of the writer that if the aliens wished to

return to Hong Kong by their own means, they would have to surrender the Seaman's Book to the Hong Kong authorities and the only permission they would obtain would be a visa to return to Hong Kong. Their status is essentially different from persons holding passports to Hong Kong since a passport from Hong Kong can be used to enter other countries and is not issued merely for the return of persons to Hong Kong and no other place.

The Courts below restricted the operation and effectiveness of the Treaty. It basically excluded most aliens in the United States from receiving any benefits of the Treaty. The petitioners are being denied relief because they did not file their applications prior to the expiration of their initial admission time in the United States, a bar to relief which was raised for the first time by Government attorney in the instant case in the District Court.

The decision of the Courts below, finding that the petitioners were ineligible for relief, is in error for the following reasons: the first and possibly the most important reason is that the appellees, Immigration Service and Department of State, had always interpreted the Treaty in a different fashion. The cases at bar were considered by the State Department and by the Immigration Service upon the merits of the aliens' claim for refugee status. The Immigration Service and the Secretary of State had never considered the immigration status of an asylum seeker when considering the asylum application. In fact, the decisions in these cases by the Secretary of State show conclusively that they were considered on the merits and were not found to be statutorily ineligible.

Copies of the decisions by the Immigration Service mailed to the petitioners are all included in the footnotes of Judge Whipple's opinion.

The original decision by the agency in these cases did not incorporate the question of lawfulness until it was raised by the United States Attorney at the argument on the original motion. It is also the position of the petitioners herein that the Government's original approach to the question of lawfulness is still being followed by the State Department and the Immigration Service in their refugee asylum cases.

Before these actions were commenced, the meaning of the word "lawful" as stated in Article 32 of the Treaty had not yet been defined. The Government now urges a strict interpretation claiming that the word "lawful" is synonymous with being in the United States in a legal status under our Immigration Laws. It is urged by the writer that it is not synonymous with the deportation sections of the United States Immigration Laws. There are numerous situations where a person can be lawfully in the United States in a non-technical sense and still be under an Order of Deportation. It is not unusual for an alien, after conceding deportability, to be granted the privilege of voluntary departure (as was done in these cases) and be allowed to remain in the United States for an indefinite period of time, even though he is under an Order finding him to be deportable from the United States. Such a person would be in the United States lawfully, that is, with the permission of the Immigration and Naturalization Service.

Another situation common to the United States Immigration Laws is that of a person who violates his status but the Immigration Service for some reason or other not wishing to deport him, grants the alien an indefinite stay of deportation either before or after a hearing before an Immigration Judge. Such a person would be allowed to remain in the territory of the United States, although deportable, and yet, it could not be alleged that he is here unlawfully or without the permission of the authorities.

Another example, which could be more closely associated with the cases at bar, would be that of an alien who at his deportation hearing conceded his deportability and asked that his deportation be stayed pursuant to Section 243(h) of the Immigration and Nationality Act. If the application is granted, the decision is that the alien is deportable, but he shall be granted a temporary stay of deportation. Such an alien certainly is illegally in the United States, however, he is here with the permission of the authorities and is allowed to remain with the permission of the authorities. Such a person is lawfully in the territory of the United States.

If the word "lawful" is to be interpreted as the lower Court ruled, it would, in fact, make the Treaty a nullity since ordinarily the only persons who would apply for the benefits of the Treaty would, by necessity, be in the United States in violation of the Immigration Laws. If this is so, we can see that the definition of the word "lawfully" must mean less than the finding that a person is a non-deportable alien. For example, if a person enters as a crewman and applies for refugee status prior to the expiration of the 29 days he is permitted to remain in the United States it would, at that very moment, make him a

deportable alien under the Immigration Laws of the United States since he would be violating the condition of his admission and, therefore, "unlawfully in the United States pursuant to the Immigration Laws".(See Section 252(b) of the Immigration and Nationality Act, as amended.)

This is exactly the situation that arose in the *Stanisic* case.

To make the Treaty more operable there must be a liberal construction of the words "lawfully in their territory".

The former Secretary of State, Dean Rusk, in his Letter of Submittal transmitted to the then President of the United States, dated July 25, 1968 stated:

> "As refugees by definition are without a homeland, deportation of a refugee is a particularly serious measure, and it would not be humanitarian to deport a refugee for reasons of health or economic dependence."

From this quotation, we can see that a refugee should not be deported on mere technical grounds if he is once found to be a refugee. The decision arrived at by the District Director and upheld by the Court below is, indeed, a harsh one. It, basically, would eliminate just about all the refugees in the United States from seeking relief under Article 32 of the Treaty. The main thrust of the Protocol is the humane treatment of refugees. The Treaty was not entered into by the United States as a mere useless gesture,

but as a viable document as stated in the General Policy Statement of the Department of State of January 4, 1972 (to wit):

> "President Nixon has reemphasized the United States commitment to the provision of asylum for refugees and directed appropriate Departments and Agencies of the United States Government, under the coordination of the Department of State, to take steps to bring to every echelon of the United States Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment."

The interpretation urged by the petitioners herein is further substantiated by the recent enactment of 8 C.F.R. 223a.3, which states:

> "*223a.3 ELIGIBILITY*
>
> Any alien physically present in the United States may apply for a refugee travel document if he believes he is a refugee. A refugee travel document shall be issued to a refugee whose presence in the United States is lawful unless compelling reasons of national security or public order otherwise require. A refugee travel document may be issued, in the exercise of discretion, to any other refugee unless reasons of national security or public order otherwise require . . . . ".

From this regulation it appears obvious that all refugees in the United States may obtain travel documents which would permit such refugees to reenter the United

States. The regulations, obviously recognize that a person who is illegally or unlawfully in the United States could still gain the benefits of the Protocol when they make the statement, "any other refugee".

Prior to January 4, 1972 neither the Immigration Service nor the State Department had any procedure for the processing or accepting applications for asylum pursuant to the Treaty. After January 4, 1972 certain procedures were set in motion. At that time and up to the present time the Immigration Service and State Department were and are accepting applications without regard to the deportable or non-deportable status of the applicant. It had been the practice when these applications were submitted to the Immigration Service, that the immigration status of the claimed refugee was ignored or not considered.

In further support of the position of the appellants that the "lawful" question was an afterthought raised after the institution of the litigation by the appellants, the Court's attention is directed to the "Operations Instructions" issued on July 26, 1972, namely, "Operations Instructions, 108.1(f)". These directions are the procedures that are to be followed by the Immigration Service when requests for asylum are made by alleged refugees. It states:

> "108.1(f) — ALIENS WITHIN THE UNITED STATES. (1) ASYLUM REQUEST PRIOR TO DEPORTATION HEARING. Any alien within the United States who requests asylum, including a crewman or stowaway, shall be interviewed as set forth in 01 108.1(a)."

It is obvious that the "stowaway" they speak about must be one who is in the United States in violation of the immigration laws. However, it is also obvious that such a person is entitled to have his application for asylum ruled upon on the merits. Thus we can see that here, again, the Immigration Service and the State Department have indicated that their intention is to read the Treaty the way the aliens claim it should be read. (Incidentally, the way it has been read where other aliens have been involved.)

It is the position of the petitioners that the Government, by now raising an argument contrary to its consistent administrative policy, makes the decision one that is arbitrary and capricious. By this, the petitioners mean that the Immigration Service and the State Department were and are accepting and ruling upon the merits of the applications submitted by persons claiming to be refugees without regard to the manner of entry or the status of the aliens in the United States. Their practice and procedure was and is to consider the applications of persons claiming to be refugees without regard to the immigration status of the aliens involved.

As the United States Court of Appeals for the Second Circuit has stated, discretion would be abused, to wit: *Hang v. Ins*, 360 F.2d, 715, 719 (2nd Circuit 1961).

> "If it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group."

If the decision below is not changed, then the effectiveness of the Treaty will be severely limited, if not totally nullified. If only refugees who are lawfully in the United States can apply, what purpose would the Treaty have? The person lawfully in the United States would not have to apply.

The decision of the Courts below clamps a lid on a humanitarian document, as well as creating an unworkable situation. The interpretation urged by the petitioners does not create any new class of aliens or quota numbers under our present immigration system. The aliens granted relief under the Protocol would not be permanent residents and our quota limit would not be violated. The only relief that would be granted would be limited in nature and scope. The aliens would merely be granted temporary stays of deportation which would be subject to review annually. If the world situation changes, the aliens would be forced to leave. There would not be an increase in the number of aliens admitted to the United States under our quota system. Justice demands that the Treaty be liberally construed.

CONCLUSION

WHEREFORE, in consideration of the magnitude of the questions presented and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A
OPINION BY WHIPPLE, DISTRICT JUDGE

Opinion by Whipple, District Judge

These matters are before the Court pursuant to the petitioners' motion for a preliminary injunction staying their deportation pending the outcome of this litigation and the defendants' counter motion for summary judgment. Plaintiffs, who are all Chinese alien seamen, after being declared deportable on various dates, sought asylum from the Secretary of State and were denied. Petitioners arguments will be treated with specificity later on in this Opinion, but first, in the interest of clarity, the Court will identify the parties.

Parties

Kan Kam Lin (Civil Action No. 1823-72), who is a native of the Republic of China, entered the United States as a nonimmigrant crewman on or about November 12, 1968. On April 21, 1971, the Immigration and Naturalization Service (INS) ordered, as a result of a deportation hearing, the plaintiff to voluntarily depart the United States since his presence here was unlawful. That order further provided that, should be plaintiff refuse to voluntarily depart, he would be deported.

Subsequent to the aforesaid order, plaintiff filed an Application for Asylum or Temporary Refuge with the INS. He stated that that application was made pursuant to the provisions of a certain Policy Statement issued by the Department of State on January 4, 1972.[1] At the same

[1] The Policy Statement in question provides in pertinent part:

"Part I—General Policy for Dealing With Requests for Asylum by Foreign Nationals

Policy. Both within the United States and abroad, foreign nations who request asylum of the U. S. Government owing to persecution or fear of persecution should be given full opportunity to have their

(footnote continued on next page)

time, plaintiff requested a stay of deportation, *see* 8 *C. F. R.* §243.4, pending a determination on the request

(footnote continued from previous page)

requests considered on their merits. The request of a person for asylum or temporary refuge shall not be arbitrarily refused by U. S. personnel. Because of the wide variety of circumstances which may be involved, each request must be dealt with on an individual basis, taking into account humanitarian principles, applicable laws and other factors.

In cases of such requests occurring within foreign jurisdiction, the ability of the U. S. Government to give assistance will vary with location and circumstances of the request.

U. S. OBJECTIVES. A basic objective of the United States is to promote institutional and individual freedom and humanitarian concern for the treatment of the individual.

Through the implementation of generous policies of asylum and assistance for political refugees, the United States provides leadership toward resolving refugee problems.

BACKGROUND. A primary consideration in U. S. asylum policy is the "Protocol Relating to the Status of Refugees," to which the United States is a party. The principle of asylum inherent in this international treaty (and in the 1951 Refugee Convention whose substantive provisions are by reference incorporated in the Protocol) and its explicit prohibition against the forcible return of refugees to condtions of persecution, have solidified these concepts further in international law. As a party to the Protocol, the United States has an international treaty obligation for its implementation within areas subject to jurisdiction of the United States.

U. S. participation in assistance programs for the relief of refugees outside U. S. jurisdiction and for their permanent resettlement in asylum or other countries helps resolve existing refugee problems. It also avoids extensive accumulation of refugees in asylum countries and promotes the willingness of the latter to maintain policies of asylum for other arriving refugees.

President Nixon has reemphasized the U. S. commitment to the provision of asylum for refugees and directed appropriate departments and agencies of the U. S. Government, under the coordination of the Department of State, to take steps to bring to every echelon of the U. S. Government which could possibly be involved with persons seeking asylum a sense of the depth and urgency of our commitment."

for asylum. The application for a stay was granted and the request for asylum was forwarded to the State Department by letter on May 19, 1972.

On June 6, 1972, the State Department made a determination that they found no reason to grant plaintiff temporary refuge or asylum. On October 19, 1972, INS communicated this denial to the plaintiff and his attorney. The reason for the denial was that Lin had failed to establish that he would be persecuted on account of race, religion or political opinion if he were deported to Hong Kong.[2]

Lin and two others filed their complaint and Order to Show Cause in this Court on November 10, 1972. An ap-

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[2] The entire letter reads as follows:

October 19, 1972

Mr. LIN Kan Kam
228 No. 6th Street
Newark, New Jersey 07107

Dear Sir:

Reference is made to your request of April 24, 1972 for asylum or temporary refuge.

After careful consideration and consultation with the Department of State, it has been concluded that you have failed to establish that you would be persecuted on account of race, religion, or political opinion if returned to Hong Kong. Therefore arrangements are again being made to effect your deportation.

You will be further advised concerning those arrangements.

Very truly yours,

G. E. BRANCH
Assistant District Director
for Deportation

cc: JULES E. COVEN, ESQUIRE
1 East 42nd St.
New York, New York

plication for a preliminary injunction was heard by the Honorable Leonard I. Garth of this district and, on December 18, 1972, an Order was entered remanding numbers 1823-72 and 1862-72 to the District Director of INS for his consideration of plaintiff's request for asylum in light of the terms of the Protocol Relating to the Status of Refugees.

On February 5, 1973 the District Director of INS advised the plaintiff that he did not fall within the ambit of the Protocol.[3] Plaintiff was on the same date noticed that

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[3] That letter states as follows:

February 5, 1973

Mr. LIN Kan Kam
228 No. 6th Street
Newark, New Jersey 07107

Dear Sir:

Reference is made to your request for political asylum and temporary refuge in the United States pursuant to the terms of the Treaty "Protocol Relating to the Status of Refugees" and the Policy Statement of the Secretary of State of January 4, 1972.

After careful consideration and consultation with the Department of State, it has been concluded that you should not be exempted from regular Immigration procedures since you have failed to establish, pursuant to Article 32(1) of the Treaty, that you are lawfully in the United States and that pursuant to Article 1(A)(2) you would be persecuted on account of race, religion, nationality, membership of a particular social group or political opinion, if returned to Hong Kong.

Therefore, arrangements are again being made to effect your deportation. Your attention is directed to the enclosed notice concerning these arrangements.

Sincerely,

DOMINICK F. RINALDI
District Director

Enc.

cc: JULES E. COVEN, ESQUIRE
1 East 42nd Street
New York, New York 10017

his deportation would take place on February 20, 1973. On February 16, 1973 another Order to Show Cause was entered seeking another preliminary injunction. On March 5, 1973, the defendants filed their motion for summary judgment pursuant to *Fed. R. Civ.* P. 56. Both motions were heard on March 26, 1973.

Yi Chun Cheng (Civil Action No. 1823-72) is a native of the Republic of China and entered the United States on or about November 26, 1969. At that time he was the holder of a valid Hong Kong Seaman's Identity book. He was refused permission to leave his ship and thereafter entered the United States illegally. On November 5, 1971, INS, after a deportation hearing, ordered Cheng to voluntarily depart the United States on or before December 15, 1971. The Order further specified that, failing voluntary departure, plaintiff would be deported to either Formosa or Hong Kong.

Subsequent to the November 5th order of INS, plaintiff sought and was granted a stay of deportation based on the fact that he had requested asylum or temporary refuge from the Department of State. The request for asylum or temporary refuge was denied by letter dated October 5, 1972 from the Department of State to INS. The denial was communicated to the plaintiff and his attorney by letter dated October 30, 1972.

Cheng thereafter joined Lin and Fong Ching Siu as a plaintiff in Civil Action 1823-72. The procedural history of that case has already been recounted.

Fong Chin Siu (Civil Action No. 1823-72) is a native of mainland China and entered the United States as a crewman on or about May 5, 1971. Siu was a resident of Hong

Kong from 1967 to 1971. In a sworn statement to INS he admitted that he entered the United States without the permission of the proper authorities. On June 25, 1971, a Special Inquiry Officer made a determination that Siu was unlawfully in the country and was to be deported to Hong Kong if he did not voluntarily depart the United States on or before July 25, 1971. Plaintiff did not comply and on June 13, 1972, after a warrant of deportation had been issued, he applied for asylum or temporary refuge and a stay of deportation. The stay was granted, but the plaintiff was notified by letter dated October 27, 1972 that his request for asylum had been denied. Siu then joined Lin and Cheng as a plaintiff in Civil Action No. 1823-72.

Yi Kam Lam (Civil Action No. 1862-72) is a native of Foochow, China and lived there from birth until 1952. He entered the United States through Savannah, Georgia on or about February 5, 1970. He was admitted as a non-immigrant crewman and was permitted to remain while his ship was in port, but in no event for longer than 29 days. *See* §252(a)(1) of the Immigration and Nationality Act, 8 *U. S. C.* §1282(a); 8 C. F. R. §252.1(d)(1). Plaintiff failed to depart and on January 12, 1972 was served with an Order to Show Cause why he should not be deported.

On March 3, 1972, a hearing was held wherein Lam admitted that he was in the country illegally and requested permission to depart vlountarily to Hong Kong. He was ordered to depart on or before July 19, 1972. On that date, however, the plaintiff applied for a stay on the grounds that he had requested asylum or temporary refuge. A stay was granted until August 31, 1972. On October 26, 1972, the District Director informed Lam that his request had been denied.

Opinion by Whipple, District Judge

Lam filed his complaint in Civil Action No. 1862-72 on November 17, 1972 and that matter was also ordered remanded by Judge Garth on December 18, 1972. On February 5, 1973, the plaintiff was notified that his request for asylum had again been denied. Lam was ordered to be deported on February 20, 1973, but the present motions have intervened.

Yu Fung Cheng (Civil Action No. 167-73) is a native and citizen of the Republic of China and entered the United States through New Orleans as an alien seaman on or about December 29, 1970. He failed to depart with his vessel at that time and did not present himself to the immigration authorities. On January 7, 1972 at his hearing, plaintiff admitted that he was in the United States illegally and sought to be allowed to depart voluntarily.

On November 9, 1972 plaintiff filed his application for asylum or temporary refuge and a stay of deportation until December 15, 1972 was granted on that basis. After receiving a recommendation from the Department of State that the request for asylum should be denied, INS communicated that denial to the plaintiff by letter dated February 1, 1973. Cheng filed his complaint in this court on February 7, 1973 and was not before Judge Garth in December but, other than the possible ramifications of the remand order, the issues are substantially the same.

Hi Pan Chan (Civil Action No. 167-73) is a native and citizen of China who entered the United States through Long View, Washington on or about November 4, 1971. At that time he was authorized to remain as long as his ship was in port, but in no event longer than 29 days. Plaintiff failed to depart and on January 28, 1972 was served with an order to show cause why he should not be deported.

Opinion by Whipple, District Judge

A hearing was conducted on March 3, 1972 at which time plaintiff admitted through his attorney that he was illegally in the country and requested voluntary departure to Hong Kong. On June 14, 1972 Chan submitted his request for asylum or temporary refuge pursuant to the Protocol. On August 14, 1972 the State Department notified INS by letter that the request for asylum should be denied. The denial was then telephonically communicated to the plaintiff's attorney. Chan thereafter joined as a plaintiff in Civil Action No. 167-73 which was filed on February 7, 1973.

Plaintiff Yeung Yan Cheung (Civil Action No. 282-73), a native and citizen of China, entered the United States through Los Angeles on or about October 27, 1970. Thereafter, Cheung was served with an order to show cause why he should not be deported and a hearing was held on May 19, 1972. Plaintiff admitted he was illegally in the country at the hearing and was given until June 19, 1972 to voluntarily depart.

Plaintiff failed to voluntarily depart and made his application for asylum or temporary refuge on September 26, 1972. On the same date he applied for a stay of deportation which was granted. By letter dated November 2, 1972, the State Department notified INS that it did not deem asylum warranted. The denial was communicated to the plaintiff by letter dated February 15, 1973. He was on the same date noticed that he would be deported on March 1, 1973. On February 28, 1973 Cheung filed Civil Action No. 282-73.

The plaintiffs assert that jurisdiction exists pursuant to 5 *U. S. C.* §§702-06, 8 *U. S. C.* §1329 and 28 *U. S. C.* §§2201 *et seq.* Jurisdiction is not contested by the defend-

ants, but that fact does not, of course, obviate the Court's examination. 8 *U. S. C.* §1329 provides in pertinent part:

> The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter.

This statute was held to confer jurisdiction on a district court to hear the motion of the plaintiff to enjoin the enforcement of a warrant of deportation in *Buckley* v. *Gibney*, 332 F. Supp. 790 (S. D. N. Y.), *aff'd*, 449 F. 2d 1305 (2nd Cir. 1971), *cert. denied*, 405 U. S. 919 (1972).

Further, this case is not one which would come within the purview of 8 *U. S. C.* §1105(a) so that the Third Circuit Court of Appeals would possess original jurisdiction. Since the action complained of was not entered during the course of an immigration hearing, nor issued upon a motion to reopen proceedings, the matter is properly before this Court. *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U. S. 206 (1968).[4]

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[4] The jurisdiction of the Circuit Court of Appeals, as defined by the Supreme Court in recent years, was reviewed in *Pilapil* v. *Immigration and Naturalization Service*, 424 F. 2d 6, 8-9 (10th Cir. 1970) as follows:

"The jurisdictional reach of §1105a has been considered on three occasions by the Supreme Court. Acknowledging the statutory language "[t]he procedure * * * shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation * * * made against aliens within the United States * * * except that —," the court expanded the reach of the exclusive jurisdiction in the Court of Appeals to include a request made in the course of a section 242(b) deportation proceeding, 8 U. S. C. §1252(b), for a suspension of deportation under section 244(a) (5), 8 U. S. C. §1254(a) (5). (1964). *Foti, supra; Giova* v. *Rosenberg*, 379 U. S.

(footnote continued on next page)

Opinion by Whipple, District Judge

The posture of these cases presents the somewhat unusual situation in which this Court must review the decision of the Secretary of State to deny asylum. Before treating that issue, however, the Court will consider the intervening motion of the defendants for summary judgment which takes logical precedence.

The United Nations Protocol Relating to the Status of Refugees (hereinafter referred to as the Protocol) was approved by the Senate on October 4, 1968 and entered into force with respect to the United States on November 1, 1968. Article 1 of the Protocol provides in pertinent part:

> 1. The State Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

(footnote continued from previous page)

18, 85 S. Ct. 156, 13 L. Ed. 2d 90 (1964) decided that the Court of Appeals also has exclusive jurisdiction to review a denial of a motion to reopen a section 242(b) proceeding. In *Cheng Fan Kwok* v. *Immigration & Naturalization Service*, 392 U. S. 206, 88 S. Ct. 1970, 20 L. Ed. 2d 1837 (1968) it was held that the exclusive jurisdiction of the Court of Appeals was limited to orders arising from the proceedings for deportation provided in section 242(b). We are limited by these to review questions arising from the proceedings as reflected in the administrative record."

This Court is cognizant of the plaintiffs ardent efforts to vest this Court with jurisdiction. Mindful of the *Foti-Giova-Fan-Kwok* trilogy, they have scrupulously avoided taking any action which would place this case within the ambit of §1105(a). They have not appealed the original decision, they have not moved to reopen, and they have not sought relief from the Attorney General under §243(h) of the Act, 8 U. S. C. §1253(h). A review of the cases in the immigration field connotes that courts must guard against dilatory tactics by astute counsel. The Court suspects such activity in this case but, in view of the present status of the law, is helpless to prevent plaintiffs' extra bite at the proverbial apple.

Opinion by Whipple, District Judge

The "Convention" referred to is the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter referred to as the Convention).

Article 1 of the Convention as modified by Article I of the Protocol defines the term refugee as

> Any person who, . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Article 32 of the Convention, which is incorporated by the Protocol, provides in pertinent part:

> EXPULSION
>
> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

Article 33 of the Convention, as incorporated by the Protocol, provides:

> PROHIBITION OF EXPULSION OR RETURN ("REFOULMENT")
>
> 1. No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . .

Opinion by Whipple, District Judge

The defendants' argument on its Rule 56 motion is two pronged. They contend that (1) plaintiffs are not "refugees" within the stated provisions and (2) plaintiffs are not "lawfully in [the] territory" as required by Article 32 of the Convention. The Court will consider the second contention first.

It is patently clear that, if the plaintiffs are not lawfully in the United States, they take nothing from the terms of the treaty. Additionally, since the facts as to their entry and continued stay are well established (and further, since the illegality of the plaintiffs' presence was established at the administrative stage), summary judgment could properly be granted in favor of the defendants since the definition of this term is a purely legal issue. *Asuncion* v. *District Director of the United States Immigration and Naturalization Service,* 427 F. 2d 523 (9th Cir. 1970); *Associated Hardware Supply Co.* v. *Big Wheel Distributing Co.,* 355 F. 2d 114 (3d Cir. 1965).

Resolution of the isue, however, is not a simple matter. The Court is aware of only two cases which have even tangentially touched on the specific question. *See Immigration and Naturalization Service* v. *Stanisic,* 395 U. S. 62 (1969); *Muskardin* v. *Immigration and Naturalization Service,* 415 F. 2d 865, 867 (2nd Cir. 1969).

Stanisic involved a situation where a Yugoslav crewman entered the country on a conditional landing permit and, during the period that this permit was valid, *see* 8 C. F. R. §252.1(d)(1), appeared at the Portland, Oregon office of the INS and claimed that he feared persecution if he was returned to Yugoslavia. In accordance with §252(b) of the Immigration and Nationality Act, 8 U. S. C. §1282 (b), the petitioner's permit was revoked and he was given

an opportunity to present evidence why he should not be deported. One of the issues before the Supreme Court was whether the case should be remanded in view of an intervening amendment to §243(h) of the Act, 8 U. S. C. §1253(h).[3] Because the statute had been amended to the extent that an alien had the burden of showing that he would suffer "persecution on account of race, religion, or political opinion" rather than "physical persecution", the Court remanded to the District Director for a new hearing under the appropriate standard. In so doing, the Court noted:

> Respondent contends that his 1965 proceeding was infected with various constitutional errors, including the District Director's alleged bias and his combination of prosecutorial, investigative, and adjudicatory functions. Because the proceeding is not before us, and because we remand for a new hearing, we have no occasion to consider these arguments, except to note that neither §252(b) of the Immigration and Nationality Act nor 8 CFR §253.1(f), under which respondent will be heard on remand, is unconstitutional on its face. *Likewise, it is premature to consider whether, and under what circumstances, an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees, to which the United States acceded on November 1, 1968.*

395 U. S. 62, 79-80 n. 22 (emphasis added).

The Court thus foresaw the potential discrepancies between the terms of the Protocol and the terms of §243(h). In this Court's view, however, one of the "circumstances"

[3] Immigration and Nationality Act §243(h), 8 U. S. C. §1253(h) (1965), *formerly* Ch. 5, §243, 66 Stat. 212 (1952).

of which the Supreme Court spoke must be the lawfulness of the alien's presence. Plaintiffs contend that the term cannot be defined as "lawfully in the territory pursuant to the immigration laws of that territory". Such a construction, argue plaintiffs, would render the Protocol nugatory since, if an alien were in the country in accordance with the immigration laws, he would have no reason to attempt to avail himself of the benefits of the Protocol. The simple answer to this assertion, of course, is that individuals who are lawfully but temporarily present could aply for asylum under the terms of the Protocol.[6]

One case at the administrative level has dealt with the specific issue in question. In *In re D————*, Board of Immigration Appeals, Interim Dec. ————, File No. A14 616 395 (April 17, 1973), the Board of Immigration Appeals was presented with an appeal from the decision of an immigration judge finding the petitioner to be a deportable alien and denying his petition for a withholding of deportation under §243(h). The issue in *D————* was whether the alien came within the terms of the Protocol and one of the sub-issues was the definition of "lawfully within the territory". Based on the legislative history of the pronouncement, both in the national and international context, the Board held that an immigrant who violates the terms of his initial entry into the country could not be considered lawfully in the territory under the Protocol.

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[6] This group would include alien seaman *while* their ship is in port and *before* the 29 day period has elapsed, see 8 C. F. R. §252.1(d)(1) and *INS* v. *Stanisic*, 395 U. S. 62, 65-67 (1969).

Opinion by Whipple, District Judge

In addition to the relevant legislative history in the United States Congress,[7] it seems abundantly clear that the

[7] When the Protocol was being considered by the Senate Committee on Foreign Relations, the following testimony was elicited from a representative of the Treaty Section of the Department of State:

"There are two categories, only two, that we think are not covered, and those are the deportation of an alien for reasons of mental illness or deficiency, where he has become institutionalized for that reason, or deportation on grounds that he has become a public charge. These two areas would not be enforced against refugees if the Protocol were in force."

Appendix 90th Cong., 2nd Sess., Executive Report No. 14, Protocol Relating to Refugees, September 30, 1968 at 8. (hereinafter cited as Report).

In his letter of submittal to the President, the Secretary of State commented on Article 32 as follows:

". . . Article 32(1) of the Convention provides that, 'The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.' Many if not most of the grounds for deportation set forth in Section 241 of the Immigration and Nationality Act, 8 U. S. C. 1251, are grounds of 'national security or public order,' including particularly the several provisions relating to subversive activities and criminal conduct. As refugees by definition are without a homeland, deportation of a refugee is a particularly serious measure, and it would not be humanitarian to deport a refugee for reasons of health or economic dependence."

In testimony before the Senate Committee on Foreign Relations, Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs, Department of State, stated as follows:

". . . [W]hile the concept of guaranteeing safe and humane asylum is the most important element of the Protocol, accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees. Rather, the asylum concept is

(footnote continued on next page)

intent of the drafters of the provisions in question was that "lawfully in the territory" was to be construed as the defendants suggest. In one of its early reports, the Committee which drafted Article 32 on behalf of the United Nations stated:

> The expression "lawfully within their territory" throughout this draft Convention would exclude a

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set forth in the prohibition against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act."

Report at 6.

The following colloquy between Senator Sparkman, Chairman of the Committee, and Mr. Dawson is also enlightening:

"SENATOR SPARKMAN. I want to make certain of this: Is it absolutely clear that nothing in this protocol, first, requires the United States to admit new categories or numbers of aliens?

MR. DAWSON. That is absolutely clear.

* * *

SENATOR SPARKMAN. And no requirement of new categories or numbers of aliens?

MR. DAWSON. That is correct, sir."

Report at 19.

In conformity with the testimony before the Committee, Senator Mansfield, at the time of the Protocol's submission to the Senate stated:

"It is understood that the Protocol would not impinge adversely upon the Federal and State laws of this country." 114 *Cong. Rec.* 12,021 (daily ed. Oct. 3, 1968).

> refugee who while lawfully admitted has overstayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission or stay.

Ad Hoc Committee on Statelessness and Related Problems, Report, U. N. E. C. O. S. O. C. at 47, U. N. Doc. E/1618/Corr. 1; E/AC.32/5/Corr.1 (March 2, 1950). After further analysis and familiarization of the possible problems involved, the same Committee stated:

> The Committee decided that it was not always necessary to insert in the text definitions of expressions used. However, since some question was raised as to the phrase "lawfully in the territory", the Committee expressed the view that, in any event, a Contracting State may consider that a refugee is no longer lawfully in its territory if he is in contravention of terms imposed as a condition of his admission or sojourn.

Ad Hoc Committee on Statelessness and Related Problems, Report, U. N. E. C. O. S. O. C. at 11, U. N. Doc. E/1850; E/AC. 32/8.

The Court has been cited to no authority, nor could it find any which would support a different construction of these terms.[8] Furthermore, it is apparent that, should

[8] Plaintiffs cite a statement made by a Mr. H. L. Hardin, Assistant Commissioner, Inspections, Immigration and Naturalization to the May 25, 1972 Conference of Association of Immigration and Nationality Lawyers in New Orleans, Louisiana:

"In determining whether a refugee is 'lawfully in the territory' of a Contracting State, regard must be had to all the circumstances of

(footnote continued on next page)

aliens be granted asylum on the basis of possible persecution with no regard to the legality of their entry, the present immigration laws and quotas imposed by this country would be devastatingly effected. For these reasons, then, it is the view of this Court that the terms "lawfully in the territory" contained in Article 32 of the Protocol and the Convention are coextensive with the orthodox theories of legal presence under the present immigration laws. Such a finding, however, does not necessarily dictate any rush to summary judgment, especially in areas which are so procedurally sensitive as immigration and naturalization law.

(footnote continued from previous page)

his presence there, and in this respect the manner in which he originally entered the territory, i.e. lawfully or unlawfully, is not the only decisive factor."

Mr. Hardin, however, was quoting from a letter dated May 26, 1971 from the Deputy Representative of the United Nations High Commissioner for Refugees. That letter, in turn, quoted directly from advice received from the Geneva headquarters of that organization. The second paragraph of that letter sheds some explanatory light on the first:

"Art. 31 of the 1951 Convention recognizes the possibility that the status of a refugee who has entered illegally the territory of a Contracting State may subsequently be regularized. Conversely, the stay of a refugee who has entered in a regular manner, may subsequently become unlawful. This would for example be the case—if the authorities of the country are not prepared to grant him residence beyond the *limited—period* for which he was admitted or if they withdraw his residence permission on the ground that he has not complied with the *conditions* under which he was admitted, e.g. to pursue his studies. As long as his stay is "lawful," even though admitted temporarily, he can only be expelled on grounds of "national security and public order." If, however, his stay ceases to be "lawful" in the circumstances described above, he is no longer "lawfully in the territory of the Contracting State" and may therefore not invoke the special protection of Art. 32 of the 1951 Convention." (Emphasis in original).

Opinion by Whipple, District Judge

The plaintiffs' petition for asylum was not made pursuant to §243(h) of the Act, although the Court notes that the aplication is certainly akin to a petition under that section. If such an application had been made, the matter of their entitlement to a hearing would, of course, be a serious question before this Court. *See Stanisic, supra; Kerkai* v. *Immigration and Naturalization Service*, 418 F. 2d 217 (3d Cir. 1969), *cert. denied*, 397 U. S. 1067 (1970). All of the plaintiffs have had deportation hearings on the question of the legality of their presence and had that issue determined against them (in many cases that finding was based on their own admission). That finding, since plaintiffs have either waived their right of appeal or not appealed within the time required by the appropriate regulations,[9] cannot now be attacked by them. *Luna-Benalcazar* v. *Immigration and Naturalization Service*, 414 F. 2d 254 (6th Cir. 1969). Any further hearing of this matter at the administrative level then would be superfluous. An inquiry into the question of possible persecution under the provisions of the Treaty would also be unwarranted, of course, in view of this finding of unlawfulness of presence.

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[9] 8 C. F. R. §242.21 provides in pertinent part:

"Pursuant to Part 3 of this chapter an appeal shall lie from a decision of a special inquiry officer under this part to the Board of Immigration Appeals. An appeal shall be taken within 10 days after the mailing of a written decision, or the stating of an oral decision, or the service of a summary decision on Form I-38 or Form I-39. The reasons for the appeal shall be stated briefly in the Notice of Appeal, Form I-290A; failure to do so may constitute a ground for dismissal of the appeal by the Board. When service of the decision is made by mail, as authorized by this section, 3 days shall be added to the period prescribed for the taking on an appeal."

Opinion by Whipple, District Judge

This Court's review of immigration proceedings is limited to a determination of whether the action taken below was arbitrary, capricious or illegal. *Biggin* v. *Immigration and Naturalization Service,* Docket No. 72-1120 (3d Cir. May 23, 1973). In view of the construction, this Court has placed on the pertinent terms of the Protocol, it must uphold the decision of the District Director as not being arbitrary or capricious. In the view of this Court, there is no reason for applying any different standard of review in this case, although the procedural history is somewhat unusual. *Compare Shkukani* v. *Immigration and Naturalization Service,* 435 F. 2d 1378 (8th Cir.), cert. denied, 403 U. S. 920 (1971).

It is the decision of this Court that the defendants' motion for summary judgment pursuant to *Fed. R. Civ.* P. 56 shall be granted against all plaintiffs in all actions herein considered. Counsel for the defendants shall prepare and submit appropriate Orders in conformity with the foregoing. No costs.

LAWRENCE A. WHIPPLE
United States District Judge.

APPENDIX B
JUDGMENT OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1866, 73-1867, 73-1868, 73-1869

YU FUNG CHENG and HI PAN CHAN,
Appellants in No. 73-1866

v.

DOMINICK RINALDI, As District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America.

(Civil Action No. 167-73)

YEUNG YAN CHEUNG,
Appellant in No. 73-1867

v.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America.

(Civil Action No. 282-73)

KAN KAM LIN, YI CHUN CHENG and FONG CHING SIU,
Appellants in No. 73-1868

v.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America.

(Civil Action No. 1823-72)

Judgment

LAM YI KAM,
Appellant in No. 73-1869

v.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America.

(Civil Action No. 1862-72)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued March 14, 1974
Before: ALDISERT, GIBBONS and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed March 25, 1974)

Lebenkoff & Coven, Esqs.
New York, New York

Allan S. Berger, Esq.
East Orange, New Jersey

Jules E. Coven, Esq., Of Counsel
Attorneys for Appellants

Jonathan L. Goldstein
United States Attorney
Newark, New Jersey

William T. Pizzi
Assistant United States Attorney
On the Brief
Attorneys for Appellees

Judgment

PER CURIAM.

Appellants are Chinese seamen who, having requested and been denied asylum under the United Nations Protocol Relating to the Status of Refugees (Protocol), brought actions in the district court against Dominick Rinaldi, the District Director of the Immigration and Naturalization Service, seeking an injunction to restrain the defendant from deporting them on the ground that his denial of asylum was arbitrary, capricious and illegal. The district court granted summary judgment in favor of the director. The plaintiffs have appealed.

The Protocol went into effect in the United States on November 1, 1968. Article 32 of the Protocol provides in part that: "1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." The district court concluded, and we agree, that the terms "lawfully in . . . [the] territory" were intended to require that a refugee under the Protocol be in a country in compliance with the immigration laws of that country. Each of the appellants has had a deportation hearing at which he was found deportable. No appeals were taken from the findings that each was unlawfully present.

We affirm the judgment of the district court for the reasons well stated in the opinion of Judge Lawrence A. Whipple, 361 F. Supp. 177 (D. N.J. 1973). *See also, Ming v. Marks*, 367 F. Supp. 673 (S.D. N.Y. 1973).

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX C
AFFIRMATION OF JUDGMENT OF UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1866, 73-1867, 73-1868, 73-1869

YU FUNG CHENG and HI PAN CHAN,

Appellants in No. 73-1866

v.

DOMINICK RINALDI, As District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America.

(Civil Action No. 167-73)

YEUNG YAN CHEUNG,

Appellant in No. 73-1867

v.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America.

Affirmation

(Civil Action No. 282-73)

KAN KAM LIN, YI CHUN CHENG and
FONG CHING SIU,

Appellants in No. 73-1868

v.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America.

(Civil Action No. 1823-72)

LAM YI KAM,

Appellant in No. 73-1869

v.

DOMINICK RINALDI, as District Director of the Immigration and Naturalization Service of New Jersey, and WILLIAM P. ROGERS, as Secretary of State of the United States of America.

(Civil Action No. 1862-72)

Appeal from the United States District Court
for the District of New Jersey

Affirmation

Present: ALDISERT, GIBBONS and ROSENN,

Circuit Judges

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed July 9, 1973, be, and the same are hereby affirmed. Costs taxed against appellants.

ATTEST:

s/ Thomas P. Quinn
Clerk

March 25, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1710

KAN KAM LIN, ET AL., PETITIONERS

v.

DOMINICK RINALDI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 493 F. 2d 1229. The opinion of the district court (Pet. App. A) is reported at 361 F. Supp. 177.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on March 25, 1974. The petition for a writ of certiorari was filed on May 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the United Nations Protocol Relating to the Status of Refugees, petitioners, Chinese alien seamen who are illegally in this country, are entitled as refugees to relief from deportation.

STATEMENT

Petitioners are natives of the Republic of China. Subsequent to the ouster of the Nationalist government from mainland China, they migrated to Hong Kong. There they obtained papers for employment as seamen and were so employed until entry into the United States.

Petitioners were thereafter served with an Order to Show Cause, charging that they were deportable since they had either entered this country illegally or had overstayed the period authorized for non-immigrant crewmen. Following a hearing at which each petitioner conceded the factual allegations in the Order to Show Cause, they were ordered deported.

Subsequent to the deportation orders and pursuant to the United Nations Protocol Relating to the Status of Refugees, petitioners filed applications for political asylum as refugees. The District Director of the Immigration and Naturalization Service denied each of these requests.[1]

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[1] The complex procedural background of the instant petition is fully set forth in the opinion of the district court (Pet. App. A, pp. 3a-8a). Briefly stated, petitioner Lin's request for asylum was forwarded to the State Department on May 19, 1972. On October 19, 1972, the Service advised Lin that he had failed to establish that he would be persecuted on the basis of race, religion or political opinion if returned to Hong Kong (Pet. App. A, p. 3a, n. 2). On November 10, 1972, petitioners Lin, Yi Chun Cheng, and Siu filed an application for a preliminary injunction in the United States District Court for the District of New Jersey (Civ. No. 1823-72). The application was consolidated with a complaint filed by petitioner Lam (Civ. No. 1862-72). On December 18, 1972, the court remanded both applications to the Immigration and Naturalization Service for further review, with directions to take into consideration the definition of the word "refugee" in Article I(A)(2) and with reference to Article 32 of the Protocol Relating to the Status of

Petitioners thereafter brought actions in the United States District Court for the District of New Jersey against the District Director and the Secretary of State to enjoin the deportations on the ground that the denial of asylum was arbitrary, capricious, and illegal. The district court, in an extensive opinion, granted summary judgment for the respondents (Pet. App. A). The court held that the term "lawfully in [the] territory" as used in Article 32(1) of the Protocol was intended to require that a refugee be in the contracting state in compliance with the immigration laws of that country. The court concluded that since petitioners were, of their own admission, illegally in the United States, they were not entitled to the benefits of the Protocol. The court of appeals affirmed (Pet. App. B).

ARGUMENT

At the end of World War II there were some eight million displaced persons in Europe; seven million of these had accepted repatriation, leaving one million as a problem of international concern. See, *Displaced Persons in Europe*, S. Rep. No. 950, 80th Cong., 2d Sess. 2-3, 8. In view of this, on March 2, 1948, the United Nations Economic and Social Council adopted Resolution 116VI(d) requesting the Secretary General of the United Nations to undertake a study of the existing situation in regard to the protection of stateless persons and make recommendations to remedy these problems.

Refugees. On February 5 petitioners Lin, Yi Chun Cheng, Siu, and Lam were advised by the District Director that the Protocol did not cover them since they had not established, pursuant to Article 32(1), that they were lawfully in the United States (Pet. App. A, p. 4a). On February 16, 1973 the present action was commenced.

Petitioners Chan, Cheung, and Yu Fung Cheng were not parties to the original district court action, they filed their complaints after the respective denials for asylum (Pet. App. A, pp.7a-8a).

As a result of the Secretary General's study, the Economic and Social Council appointed an Ad Hoc Committee, consisting of representatives of thirteen governments, to draft a convention relating to the international status of refugees and stateless persons. The revised draft was completed on August 25, 1950, and the convention was adopted by the conference of plenipotentiaries which met in Geneva in July 1951. The convention defines a "refugee" in Article 1(A)(2) as any person who

> * * * owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 32 of the convention provides in relevant part:

> The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

The United States became a Contracting State under the provisions of the United Nations Protocol Relating to the Status of Refugees on November 1, 1968. 19 U.S.T. 6257.

Petitioners claim that under this Protocol they are entitled to "refugee" status and accordingly, may not be expelled except on grounds of national security or public order. This contention is refuted by the express terms of the Protocol and its historical background.

As noted above, Article 32 only benefits those refugees "lawfully in [the] territory" of the contracting state. The Article is inapplicable to petitioners, who are admittedly in this country in violation of its immigration laws.[2] In his commentary on the Convention, Professor Robinson observed that:

> Par. 1 deals with the expulsion of refugees lawfully in the country, which means that no such safeguards exist in favor of refugees unlawfully in the territory of the state, except those set up in Art. 31(2) and Art. 33. In other words, while, as a rule, refugees lawfully in a country may not be expelled except on the grounds and in the manner prescribed in Art. 32, illegal refugees may be expelled without such grounds, and without the guarantee of par. 2, except insofar as Art. 33(1) applies and insofar as Art. 31 requires the states to grant illegals sufficient time and facilities to obtain admission into another country; once the facilities have been granted and the reasonable period has expired, expulsion (except to a dangerous area) may be ordered on the basis of an administrative decision and the procedure established for such cases at the discretion of every Contracting State.***
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> It cannot be considered expulsion if a refugee who was admitted to a Contracting State on a temporary basis with a travel document issued by another Con-

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[2]Petitioners argue that this interpretation renders the Protocol "a nullity since ordinarily the only persons who would apply for the benefits of the Treaty would, by necessity, be in the United States in violation of the Immigration Laws" (Pet. 16). Contrary to this claim, four of the petitioners in this case entered this country lawfully as alien crewmen and could have properly made their claim under the provisions of the Protocol during the period of lawful admission; however, they did not do so.

> tracting State, is refused permission to stay there beyond the authorized period. Technically he would be a refugee "unlawfully" in the country, although he would not fall into the category of illegal refugees of whom Art. 31 treats. [Robinson, *Convention Relating to the Status of Refugees—Its History, Contents and Interpretation*, pp. 156-157 (1953).]

The legality of the refugee's presence is determined by the immigration laws of the country in which he claims "refugee" status. As the Ad Hoc Committee Report states:

> The expression "lawfully within their territory" throughout this draft Convention would exclude a refugee who while lawfully admitted has overstayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission or stay. [*Ad Hoc Committee on Statelessness and Related Problems, Report*, U.N.E.C.O.S.O.C. at 47, U.N. Doc.E/1618/ Corr. 1; E/AC. 32/5/Corr. 1 M (March 2, 1950).]

A later report of the Committee again emphasized that the refugee must be in the country in conformity with that country's immigration laws. The report states:

> The Committee decided it was not always necessary to insert in the text definitions of expressions used. However, since some question was raised as to the phrase "lawfully in the territory," the Committee expressed the view that, in any event, a Contracting State may consider that a refugee is no longer lawfully in its territory if he is in contravention of terms imposed as a condition of his admission or sojourn. [*Ad Hoc Committee on Statelessness and Related Problems, Report*, U.N.E.C.O.S.O.C. at 11, U.N. Doc. E/1850; E/AC. 32/8 (August 25, 1950).]

The legislative history of the Protocol in the Senate also indicates that this country's immigration laws would govern its application. In testimony before the Senate Committee on Foreign Relations, Laurence A. Dawson, Acting Deputy Director of the Office of Refugee and Migration Affairs, Department of State, stated:

> * * * [W]hile the concept of guaranteeing safe and humane asylum is the most important element of the Protocol, accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees. Rather, the asylum concept is set forth in the prohibition against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in the territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol without amendment of the Act. [Appendix, 90th Cong. 2d Sess., Executive Report No. 14, Protocol Relating to Refugees, September 30, 1968, at 6.]

The courts below properly held that the status accorded refugees must be viewed in the context of the legality of their presence under the immigration laws of this country. See also *Ming* v. *Marks*, 367 F. Supp. 673

(S.D. N.Y.). Since petitioners admittedly are in this country illegally, the benefits of the Protocol are not available to them.[3]

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[3]Petitioners also argue that new regulations governing the issuance of travel documents support their claim. Specifically, they rely on 8 C.F.R. 223a.3, which states:

> Any alien physically present in the United States may apply for a refugee travel document if he believes he is a refugee. A refugee travel document shall be issued to a refugee whose presence in the United States is lawful unless compelling reasons of national security or public order otherwise require. A refugee travel document may be issued in the exercise of discretion, to any other refugee unless reasons of national security or public order otherwise require; sympathetic consideration shall be given to such an application unless the Service intends to expel or exclude the alien from the United States. * * *

Petitioners reason that this regulation permits all refugees to retain travel documents, which would permit such refugees to reenter the United States. Hence, they conclude that if the refugee can leave and return, he ought likewise be permitted to remain without leaving. As the district court observed in *Ming* v. *Marks*, *supra*, 367 F. Supp. at 680:

> The fallacy, however, is that it is not "obvious" at all that "all refugees" may get travel documents. Indeed, the regulation, in language quite similar to the Convention, provides that the travel document shall issue only if the presence of the refugee in this country is "lawful." The fact that this country may, in its discretion, issue documents to refugees here unlawfully, is not only in conformance with Article 28 of the Convention, but is of no help to the plaintiffs, since the Convention indicates that the purpose of this discretionary power was to permit travel by those who cannot be deported because they will not be accepted elsewhere.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1974.